IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1982

No._____

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DENNIS MCCABE

Petitioner-Appellant

- against -

COMMISSIONER OF INTERAL REVENUE

Respondent-Appellee

----------X

A P P E N D I X

Paul S. Brenner
Attorney for Petitioner-Appellant
John Maguire, of counsel
LAW OFFICES OF RICHARD HARTMAN
252-00 Horace Harding Expressway
Little Neck, NY 11362
(423-1800)

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 646 - August Term, 1981

(Argued January 25, 1982 Decided April 14, 1982)

Docket No. 81-4175

DENNIS McCABE

Petitioner-Appellant,

- against -

COMMISSIONER OF INTERNAL REVENUE,

Respondent-Appellee

Before:

MESKILL and CARDAMONE, Circuit Judges, and HOLDEN, District Judge.*

Appeal from a decision of the United States Tax Court (en banc), Raum, J., which denied appellant a deduction taken under I.R.C. Section 162.

Affirmed. Meskill, C.J., dissents.

PAUL BRENNER, New York, New York (RICHARD HARTMAN Jeffrey S. Wasserman, Law Offices of Richard Hartman, New York, New York, on the brief), for Petitioner-Appellant.

STEVEN I. FRAHM, Attorney, Tax Division, Dept. of Justice, Washington, D.C. (Glenn L. Archer Jr.., Assistant Attorney General, Washington, D.C., Michael L. Paup, Chief, Appellate Section, Tax Division, Department of Justice, Washington, D.C., Jonathan S. Cohen, Attorney, Tax Division, Department of Justice, Washington, D.C., on the brief), for Respondent-Appellee.

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*Honorable James S. Holden, Chief Judge of the United States District Court for the District of Vermont, sitting by designation.

CARDAMONE, Circuit Judge:

The appellant, Dennis McCabe, a police officer employed by the City of New York, was required to carry his service revolver at all times while in the City. To reach his place of employment the most direct route from his home to Suffern, New York is through the State of New Jersey. New Jersey will allow an officer such as petitioner to carry a weapon only by permit. Stating that he could not expect to obtain a New Jersey permit, appellant carried his service revolver on his person and used his own automobile as his mode of transportation to and from work. As a result he claimed an employee business deduction in the amount of $2,950 for automobile expense on his 1976 tax return. The Commissioner of Internal Revenue, appellee, disallowed the claimed deduction and the Tax Court affirmed that determination. Appellant appeals from that decision. We affirm for the reasons which follow.

FACTS

The facts of this case were stipulated and may be briefly stated. At the time he filed his petition in 1976 appellant resided in Suffern, New York. Suffern, a relatively remote suburb of New York City, lies west of the Hudson River and immediately adjacent to the State of New Jersey. Appellant was employed as a New York City police officer assigned exclusively to Manhattan's Twenty-Eighth Precinct. The regulations of the New York City Police Department then in effect required police officers to be armed at all times when in the City, unless otherwise directed[1] The State of New Jersey, through which petitioner would travel were he to commute to work by the most direct route, permits officers employed by governmental agencies outside the State to carry weapons in New Jersey only while engaged in official duties and upon prior notification to local police authorities. See N.J. Stat. Ann. Section 2A: 151-43(a) (West 1969) (repealed 1979) (Current version of N.J. Sta. Ann. Section

New York City police officers carrying a service revolver through New Jersey either by public or private conveyance would be in violation of New Jersey law without a New Jersey gun permit. Generally, New Jersey authorities issue gun permits only to those persons whose job requirements necessitate that they be armed in New Jersey or to persons able to establish urgent need[2].

Throughout 1976 appellant used his personal automobile as his exclusive means of commuting to and from his duty station at the Twenty-Eighth Precinct. While commuting he carried his service revolver on his person and did not modify his automobile to accommodate the gun. Therefore, the cost of operating the vehicle by carrying a revolver was the same as it would have been had he commuted to his job by automobile without the revolver. But the record clearly established that appellant's commuting costs could have been reduced had he been able to travel through New Jersey.[3] The record further shows that ample public transportation existed from Suffern to New

York City.[4] Since much of the convenient public transportation went through New Jersey, appellant would have again been faced with the need for a New Jersey gun permit.

On his 1976 income tax return appellant claimed $2,950[5] in automibile expenses as a deduction on Form 2106, Employee Business Expenses. This deduction represented the commuting costs of driving 17,600 miles between Suffern and New York City, which included bridge and thruway tolls. The Commissioner of Internal Revenue disallowed the entire deduction and the Tax Court affirmed.

DISCUSSION

At issue before us is when the ordinary and necessary business deduction embodied in Internal Revenue Code (I.R.C.) section 162(a) (1976)[6] may properly be claimed. We first analyze this issue to determine whether it is one of fact or law. In Commissioner v. Heininger, 320 U.S. 467 (1943), the Supreme Court stated that "[w]hether an expenditure is directly

related to a business and whether it is ordinary and necessary are doubtless pure questions of fact in most instances. Expect where a question of law is unmistakably involved a decision of the Board of Tax Appeals [presently the United States Tax Court] on these issues...should not be reversed by the federal appellate courts." Id. at 475 (emphasis supplied) (footnote omitted). See, e.g., Sibla v. Commissioner, 299 F.2d 48 (7th Cir. 1962); Chenango Textile Corp. v. Commissioner, 148 F.2d 296 (2d Cir. 1945); Geo. J. Haenn v. Commissioner, 147 F. 2d 682 (3d Cir. 1945); see also, Dobson v. Commissioner, 320 U.S. 489 (1943).[7]

As we recognized in Chenango the determination of whether a question is one of law or one of fact is not always easy. This is particularly true where the lower court cites appellate court opinions to justify its conclusion, since it then becomes difficult to determine whether that court exercised its own independent judgment. In Chenango we resolved this dilemma by

placing particular emphasis on the Supreme Court's language in Heininger. "[S]ince there is not a 'quesion of law...unmistakably involved' we shall assume that the decision was the result of a determination of fact . . ." Chenango, 148 F.2d at 298.

Here we are asked to rule on the ordinary and necessary business deduction. This is a factual inquiry and one which has been answered by the Tax Court. However, as in Chenango, the lower court relied on appellate court opinions to justify its conclusion. Because it cannot be said that a question of law is not unmistakably involved, we employ the Chenango rule and assume that the Tax Court's decision was the result of a determination of fact. In the context of a question of fact it will be necessary to determine only whether the Tax Court's decision was clearly erroneous, i.e., not adequately supported by the evidence, which will be discussed at II, infra.

Internal Revenue Code section 162 is concerned with expenses incurred as a direct

result of engaging in business. For appellant to prevail he must establish that his expense falls within the general provisions of section 162(a)[8] - ordinary and necessary expenses of carrying on a trade or business. We agree with the determination of the Tax Court that petitioner failed to meet his burden in this regard.

For section 162 purposes "ordinary" means normal and expected; "necessary" means appropriate and helpful.. Commissioner v. Heininger, 320 U.S. at 471. Thus, the question becomes whether petitioner's additional expenses were appropriate, helpful, normal and expected under the circumstance or so personal in nature as to be nondeductible under I.R.C. Section 262 (1976).[9]

One well-established rule in tax law is that expenses incurred as a result of commuting from home to work are personal and not deductible under Section 162. Treasury Regulation Section 1.162-2(e) provides that "[c]ommuters' fares are not considered as business expenses and are not deductible."

Treas. Reg. Section 1.162-2(e) (1958). See also, Treas. Reg. Section 1.262-1(b)(5) (1972). The controlling precedent on this issue is Commissioner v. Flowers, 326 U.S. 465 (1946).

In Flowers the Court was faced with a case involving a taxpayer who lived in Jackson, Mississippi and worked in Mobile, Alabama. The taxpayer tried to deduct the travel expenses incurred in his excursions between the two cities and also claimed his expenditures for meals and hotel accomodations while in Mobile. The Supreme Court ruled that the additional expenses, including the commuting expenses, were not deductible. Although Flowers was concerned mostly with what is now I.R.C. Section 162(a)(2)[10], the Court's general analysis of Section 162 sheds illumination on the question before us. In setting forth the final prong of a three-part test of travel expense deductibility,[11] the Court stated that the "expense must be incurred in pursuit of business. This means that there must be a direct connection between the expendi-

ture and the carrying on of the trade or business of the taxpayer or of his employer. Moreover, such an expenditure must be necessary or appropriate to the development and pursuit of the business or trade." 326 U.S. at 470. The Court concluded that the travelling expenses were "not incurred in pursuit of the business of the taxpayer's employer." Id. at 473. Further, the added costs were said to be "unnecessary and inappropriate" to the development of the employer's business. Id. The Court was of the view that the sole cause of the expense was the taxpayer's personal desire to reside in Jackson, "a factor irrelevant to the maintenance and prosecution of the [employer's] legal business." Id. Thus, personal convenience cannot be the motivating factor behind a Section 162(a) deduction. Where one chooses to live is generally a matter of personal convenience. See, e.g., Hitt v. Commissioner, 55 T.C.: 628 (1971); Gilberg v. Commissioner, 55 T.C. 611 (1971).

An exception to the commuting rule appears in Fausner v. Commissioner, 413 U.S.

838 (1973). Fausner acknowledged that commuting expenses are not deductible. "Congress has determined that all taxpayers shall bear the expense of commuting to and from work without receiving a deduction for that expense. We cannot read Section 262 of the Internal Revenue Code as excluding such [commuting] expense[s] from 'personal' expenses because by happenstance the taxpayer must carry incidentals of his occupation with him." 413 U.S. at 839 (footnote omitted). The brief per curiam states, however, that "[a]dditional expenses may at times be incurred for transporting job-requested tools and material to and from work. Then an allocation of costs between 'personal' and 'business' expenses may be feasible." Id. (footnotes omitted). While the Court provides little or no guidance as what kind of circumstances should trigger such an allocation, its specific reference to the commuter rule would indicate that the requirements of Section 162(a) - ordinary and necessary - must first be established before reaching

the reaching the additional step of allocating.

The Internal Revenue Service in Revenue Ruling 75-380, 1975-2 C.B. 59 sought to explain Fausner. It stated that for additional expenses to be deductible the taxpayer must first establish "the necessity of transporting work implements to and from work." 1975-2 C.B. at 60. Giving the word "necessity" its usual meaning in tax law, it again appears that the taxpayer must establish that the additional expenses were appropriate and helpful to the employer's legal business and not personal in nature.

II

With this background in mind we may resolve the case presently before us. Appellant has argued that he may deduct the additional travelling expense incurred by reason of the use of his automobile in transporting his police revolver. However, a majority of the Tax Court ruled, sitting en banc:

> that petitioner's additional commuting expenses were not directly connected with the pursuit of his employer's business, but were principally the result of his decision to reside in a comparatively remote suburb adjacent to New Jersey. Accordingly, petitioner is entitled to no deduction for his commuting expenses under section 162(a), I.R.C. 1954, since such expenses were not necessary for the conduct of his employer's business.

McCabe v. Commissioner, 76 T.C. 876, 881 (1981).

We turn now to the applicable scope of appellate review on an appeal from the Tax Court. This standard is set forth in 26 U.S.C. Section 7482(a) (1976) which states that "[t]he United States Court of Appeals shall have exclusive jurisdiction to review the decisions of the Tax Court... in the same manner and to the same extent as decisions in the district courts in civil actions tried without a jury..." Federal Rule of Civil Procedure 52(a) states that findings of fact shall not be set aside unless clearly erroneous. "A finding is 'clearly erroneous' when although there is evidence to support it, the review-

ing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." United States v. United States Gypsum Co., 333 U.S. 364, 395 (1948). See, e.g., Commissioner v. Duberstein, 363 U.S. 278, 291 (1960). While Taylor v. Lombard, 606 F.2d 371, 372 (2d Cir. 1979), citing both Smith v. Regan, 583 F.2d 72, 76 (2d Cir. 1978) and United States ex rel Lasky v. LaValleem 472 F.2d 960, 963 (2d Cir. 1973), indicates the "clearly erroneous" standard applies only when live testimony and credibility factors are involved, the standard also extends to findings derived from inferences drawn from documents or undisputed facts. United States Gypsum Co., supra, 333 U.S. at 394. See also United States v. Florida, 482 F.2d 205, 208 n. 8.

We are persuaded that the critical finding of the Tax Court, as set out above, is adequately based on permissible inferences derived from the stipulated facts. Since the record does not generate a definite

and firm conviction that a mistake has been committed, we must affirm the Tax Court. The New York City requirement that police officers be armed within city limits presented a problem for appellant simply because of the location of his home. Had he lived almost any place else in the New York City metropolitan area of New York State he would not have had to travel through the neighboring state of New Jersey. The Police Department required that officers be armed within New York City limits; it did not require them to be armed otherwise. Thus, the added expense incurred by appellant did not further the New York City Police Deparment's business of preventing crime within the City itself.

Finally, appellant's argument that he falls with the ambit of Fausner is fatally defective. Although concededly he incurred additional expense, in order to deduct it he must first show that it was ordinary and necessary. As noted, the location of one's home is personal and did not serve to further

the business of the taxpayer's employer in this case.

The judgment is affirmed.

FOOTNOTES

[1] Patrol Guide Section 105-1, which so provided, has since been amended so that police officers are no longer required to carry a firearm while "off duty."

[2] It is not clear from the stipulated facts whether the Commissioner concedes that had appellant actually applied for a New Jersey gun permit, such application would have been turned down. Appellant claims that this was the intent of the language included in the stipulation. Since the government may have misleadappellant into believing that he need not apply for the New Jersey gun permit, we find it desireable to reslove whatever ambiguity may exist in apppellant's favor so as to allow for a determination of this case. We do not mean to suggest that the general rule requiring exhaustion of administrative remedies is to be lessened.

[3] A daily round trip was approximately eighty miles via New York highways with toll costs of two dollars per day and took approximately seventy-five minutes

one way. Were appellant to have driven through New Jersey his toll costs would have been one dollar and fifty cents per day, the distance traveled would have been approximately fifty miles and travel time approximately forty-five minutes one way.

[4] The Shortline Bus Company provides weekday departures from Suffern to New York City at least as frequently as every fifteen minutes between 6:00 a.m. and 8:09 a.m. in the morning. In the evening between 4:00 p.m. and 6:10 p.m. weekday departures left New York City for Suffern at least as frequently as every twenty minutes. Appellant's tour of duty during 1976 consisted of working weekdays from 8:00 a.m. to 4:00 p.m.

[5] Appellant no longer seeks a deduction in the amount of $2,950. Instead the dispute concerns only a portion of that sum - the difference between the cost of driving through New York and the cost of public transportation passing through New Jersey -

which has not been given a dollar amount in the record before us.

[6] Section 162(a) provides that :

> In General - There shall be allowed as a deduction all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business...

I.R.C. Section 162(a) (1976).

[7] For discussions on the scope of appellant review of a Tax Court decision, see generally, Commissioner v. Idaho Power Co., 418 U.S. 1 (1974) (Douglas, J., dissenting); Commissioner v. Duberstein, 363 U.S. 278 (1960); Burton-Sutton Oil Co. v. Commissioner, 328 U.S. 25 (1946) (Frankfurter, J., Concurring); Commissioner v. Wilcox, 327 U.S. 404 (1946); John Kelley Co. v. Commissioner, 326 U.S. 521 (1946); Trust of Bingham v. Commissioner, 325 U.S. 365 (1945) (Frankfurter, J., concurring).

[8] Section 162(a), see note 6, supra, provides the general rule on the deductability of business expenses. The list of specific

deductions found in paragraph (a)(1) through (a)(3) is exemplary only. For instance (a)(1) deals with salaries and compensation, while (a)(3) concerns rent and other payments required for possession of business property. Paragraph (a)(2) deals with travel expenses incurred "while away from home," a phrase which has been "held to apply only to overnight trips or to travel requiring sleep or rest." Gilberg v. Commissioner, 55 T.C. 611, 614 (1971). See, United States v. Correll, 389 U.S. 299 (1967). Nowhere in the record has appellant contended that he incurred expenses "while away from home." Thus for appellant to prevail he must establish that he is covered by the general provisions of section 162 (a).

9 "Except as otherwise expressly provided in this chapter, no deduction shall be allowed for personal, living, or family expenses." I.R.C. Section 262 (1976).

10 See note 8, supra.

11
The first two prongs which must be satisfied before a travelling expense deduction may be taken under section 162(a)(2) are:

(1) The expense must be a reasonable and necessary travelling expense, as that term is generally understood. This includes such items as transportation fares and food and lodging expenses incurred while travelling.

(2) The expense must be incurred "while away from home." Commissioner v. Flowers, 326 U.S. 465, 470 (1946).

#81-4175
McCabe v. C.I.R.

MESKILL, Circuit Judge (dissenting):

I respectfully dissent.

I cannot agree with the majority's conclusion that McCabe's additional commuting costs were entirely a result of his personal choice of residence. In Fausner v. Commissioner, 413 U.S. 838 (1973) (per curiam), the Supreme Court disallowed a deduction for commuting costs where the taxpayer, a commercial airlines pilot, claimed that his "automobile expenses were incurred to transport his flight bag and overnight bag and thus constituted ordinary and necessary business expenses." Id. at 838. Because the taxpayer would have driven to work via the same route in any event, the Court found that no "allocation of costs between 'personal' and 'business' expenses" was feasible. Id. at 839. The Internal Revenue Service has construed Fausner:

> to allow an ordinary and necessary business expense deduction for only the portion of the cost of transporting the work implements by the mode of transportation used which is in excess of cost of commuting by the same mode of transportation without the work implements. The fact that a taxpayer might have or would have used a less expensive mode of transportation if it had not been necessary to carrying the work implements is immaterial.

Rev. Rul. 75-380, 1975-2 C.B. 59, 50.

This case is factually distinguishable from Fausner. Had McCabe driven to work without his firearm, he could have travelled through New Jersey. As a result of his alleged inability to secure a New Jersey gun permit, however, McCabe was forced to take a circuitous route, adding fifty cents in tolls and fifteen miles to his commute. Compare Stipulated Facts, Paragraphs 13-14 with Stipulated Facts, Paragraphs 30-31. Certainly, these additional costs were caused by his employer's requirement that he carry his firearm at all times while within New York City and can be allocated as "business" expenses under Fausner.

The majority's reasoning, that "the location of one's home is personal and in

this case does not serve...to further the business of the taxpayer's employer[,]" Maj. Op. at 8, drawn to its logical extreme, would disallow or render meaningless almost all Fausner-type deductions. A taxpayer can almost always reduce or eliminate his excess commuting costs by living closer to his work location. The real issue is whether, given the location of McCabe's residence and his selection of a reasonable mode of travel, he incurred additional "ordinary and necessary" commuting cost "in the pursuit of the business of the taxpayer's employer." Commissioner v. Flowers, 326 U.S. 465, 473 (1946). To the extent that McCabe's change in route of travel was necessary to satisfy his employer's requirement that he carry his firearm while in New York City, I believe that he is entitled to a deduction under section 162(a) of the Internal Revenue Code.

The record does not indicate, however, whether McCabe ever applied for a New Jersey gun permit or demonstrated the futility of such an application. McCabe's inability

to obtain a permit is critical to his argument that his additional commuting costs are deductible as "ordinary and necessary" business expenses pursuant to Section 162(a). The sole factual Stipulation concerning his attempt to obtain a permit states:

> Generally, New Jersey authorities issue gun permits only to those individuals with job requirements necessitating that they be armed in that state or to individuals who can establish other urgent need. Applications for gun permits are evaluated on their own merits..

Stipulated Facts, Paragraph 9. I would therefore remand this case to the Tax Court for a determination of what efforts, if any, McCabe made to acquire a permit. If the Tax Court determined that McCabe never applied for a permit or that he failed to demonstrate the futility of an application, the Court should disallow his deduction for failure to meet the threshold showing that the added commuting expenses incurred were necessary. If the Court were satisfied, however, that McCabe could not obtain a permit, it should allow his deduction

under Section 162(a).

76 T.C. No. 76

UNITED STATES TAX COURT

DENNIS McCABE, Petitioner v. COMMISSIONER OF INTERNAL REVENUE, Respondent

Docket No. 1536-78 Filed June 3, 1981.

T, a New York City police officer, is required to carry his revolver at all times while in New York City. T lives in a relatively remote suburb of New York west of the Hudson River and immediately adjacent to New Jersey. The most convenient and direct routes to T's post of duty in New York City require travel through New Jersey, the statutes of which prohibit T from carrying his revolver while in that state. Accordingly, T drives to work by the way of the more circuitous New York highways, although he would otherwise use the more convenient public transportation through New Jersey and incur less commuting expenses but for the necessity of carrying his revolver. T seeks to deduct the difference between the cost of driving through New York and the cost of public

transportation passing through New Jersey.

Held, Petitioner is entitled to no deduction for his commuting expenses because they were not directly connected with his employer's business, but were personal expenses incurred as a result of petitioner's choice of the location of his residence.

Paul S. Brenner, for the petitioner.

Robert J. Alter, for the respondent.

OPINION

RAUM, Judge: The Commissioner determined a $908 deficiency in petitioner's 1976 income tax. The only remaining issue is whether petitioner is entitled to deduct some portion of his automobile expenses in transporting himself and his service revolver to and from his place of employment as a police officer. The case was submitted on the basis of a stipulation of facts.

During 1976, and at the time he filed his petition herein, petitioner resided in Suffern, New York. Suffern is a relatively remote suburb west of the Hudson River and is immediately adjacent to the State of New Jersey. In 1976, he was employed as a New York City police officer assigned exclusively to the 28th Precinct at 2271 Eighth Avenue, New York, New York. Petitioner's tour of duty during 1976 consisted of working 243 weekdays from 8:00 a.m. until 4:00 p.m. only.

The regulations of the New York Police Department require police officers

to be armed at all times when in the City of New York unless otherwise directed. However, New Jersey, through which petitioner would travel if he commuted to work by driving over the most direct route or taking a bus, permits officers employed by governmental agencies outside the State of New Jersey to carry weapons in New Jersey only while engaged in official duties and upon prior notification to local police authorities. See N.J. Stat. Ann. sec. 2a:151-43(s) (West 1969) (repealed 1979) (current version at N.J. Stat. Ann. sec. 2C:39-6(b)(1) (West 1980)). New York City police officers carrying a service revolver through New Jersey by either public or private conveyance would be in violation of the New Jersey law if they did not have a New Jersey gun permit. Generally, New Jersey authorities issue gun permits only to those person with job requirements necessitating that they be armed in that state or to person who can establish other urgent need. Applications

for gun permits are evaluated on their own merits.

During 1976, petitioner used his personal automobile as his exclusive means of commuting to and from his post of duty at the 28th Precinct. Petitioner did not use his own automobile during his work day. When petitioner commuted to his job by automobile, he carried his service revolver on his person and did not modify his automobile in any way in order to carry the revolver. Petitioner incurred no added expense in the cost of operating his vehicle by carrying his revolver above that which he would have incurred if he had commuted to his job by automobile without the revolver. In travelling by automobile to and from the 28th Precinct from his home, petitioner traveled approximately 40 miles each way via New York highways. His route generally took 75 minutes to drive; toll costs were $2 per day. If petitioner had driven through New Jersey in commuting

to work, his toll costs would have been $1.50 per day, the distance would have been approximately 25 miles one-way, and travel time would have been approximately 45 minutes.

During 1976, a bus service provided by the Shortline bus company traveled from Suffern, New York, to the Port Authority Bus Depot in New York City. However, this bus traveled through New Jersey. If petitioner had taken the bus to New York City, he would have boarded the bus at a stop located two blocks from his home in Suffern. Between 6:00 a.m. and 8:00 a.m., weekday departures from Suffern for New York City occurred at least as frequently as every 15 minutes; in the evening, between 4:00 and 6:00 p.m., weekday departures from New York City for Suffern occurred at least as frequently as every 20 minutes. Travel time by bus from petitioner's home to the Port Authority Bus Terminal was approximately one hour. The one-way fare between Suffern and the bus terminal in Manhattan was $2.70;

however, a 50-trip bus ticket cost $76.60 from January 1 through October 27, 1976, and $82.75 for the remainder of 1976. From the Port Authority Bus Depot, petitioner would have to have taken an approximately 15 minute subway ride to the 28th Precinct. During 1976, petitioner could have ridden the subway without charge due to his police officer status.

Petitioner could also have used public transportation that did not pass through New Jersey. Petitioner could have driven 16 miles to Tarrytown, New York, on the east side of the Hudson River, and taken the Hudson line of Conrail to Grand Central Station in New York City. The drive to Tarrytown would have required approximately 30 minutes; round trip tolls between Suffern and Tarrytown would have been $1.50 per day, and parking at the Tarrytown train station would have cost $90 per year. The time from Tarrytown to Grand Central Station ranged from 38 to 54 minutes, depending upon which train was utilized. A monthly commuting ticket

cost $58.75. The route that petitioner actually took in driving his automobile from Suffern to this post of duty in New York City passed through Tarrytown.

On his 1976 income tax return, petitioner claimed $2,950 in automobile expenses as a deduction on form 2106, Employees Business Expenses. This deduction represented the commuting costs for 17,600[1] miles plus bridge and thruway tolls by virtue of petitioner's use of an automobile rather than a bus or train to travel between his home in Suffern, New York, and his job in New York City. The Commissioner disallowed the entire deduction.

It is well settled that a taxpayer's cost of commuting between his residence and his place of employment is a non-deductible personal expense. Sections 1.162-2(e) and 1.262-1(b)(5), Income Tax Regs.; see, e.g., Fausner v. Commissioner, 413 U.S. 838, 839 (1973); Commissioner v. Flowers, 326 U.S. 465, 473 (1946); Donnelly v. Commissioner, 262 F. 2d 411, 412, (2d Cir.

1959); Feistman v. Commissioner, 63 T.C. 129, 134 (1974), appeal dismissed 587 F. 2d 941 (9th Cir. 1978); Anderson v. Commissioner, 60 T.C. 834, 835 (1973). However, an exception to this rule has been recognized with respect to employees who are required by their employer to transport job related tools to and from work and thereby incur expenses in addition to the ordinary commuting costs they otherwise would incur.

1.

In computing the deduction for automobile expenses, petitioner determined the annual mileage driven by multiplying the 80 mile daily trip distance by 220 days. According to the stipulation, petitioner in fact worked 243 days in 1976, but he has presented no claim for an increased deduction. See Fausner v. Commissioner, supra, 413 U.S. at 839; Kallander v. United States, 526 F. 2d 1131, 1136 (Ct. Cl. 1975); Coker v. Commissioner, 487 F. 2d 593, 594 (2d Cir. 1973), cert. denied 414 U.S. 1130 (1974);

Feistman v. Commissioner, supra, 63 T.C. at 135; Gilberg v. Commissioner, 55 T.C. 611, 618-619 (1971); Hitt v. Commissioner, 55 T.C. 628, 632-633 (1971). If such additional expenses are incurred, they are deductible as "ordinary and necessary" business expenses pursuant to Section 162(a) I.R.C. 1954.

Petitioner claims that but for the necessity of carrying his gun, he would have taken the bus and subway to work, and thereby avoided the greater expense incurred in driving to work. Although petitioner's return claimed a deduction for his entire expenses[2] incurred in driving to work, he now claims, in his petition and on brief, a deduction for only the excess of this automobile expenses over the costs that he would have incurred in commuting by bus and subway.

The Government contends first that any additional commuting expenses petitioner incurred as a result of petitioner's personal

choice of the location of his residence, and did not arise out of his employer's requirement that he carry his gun while within New York City. The Government further disputes petitioner's assertion that he would have taken public transportation to work but for the necessity of carrying his gun; it argues that if petitioner desired to take public transportation to work, he would have driven to Tarrytown (which was on his actual route to New York City) and taken Conrail to Grand Central Station. Finally, relying on Rev. Rul. 75-380, 1975-2 C.B. 59, 60, the Government contends that the basic cost of commuting, whether by automobile or public transportation, is a nondeductible personal expense, and that petitioner is therefore entitled to no deduction because he incurred no tool-carrying expenses beyond

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2. But note 1, supra.

the basic cost of commuting to work.

It is stipulated that if petitioner had been called to testify in this case, he would have stated that he would have taken the bus and subway to work were it not for his having to commute carrying his service revolver. Because this case was submitted under Rule 122, we had no opportunity to observe petitioner's credibility as a witness. Petitioner's assertion that he would have preferred to commute by bus and subway is supported by the facts that the bus stopped only two blocks from his residence and that the commuting time by bus and subway was not substantially greater than the commuting time driving over New York highways. We accordingly find as a fact that petitioner would have commuted to work by using the bus and subway but for the necessity of carrying his service revolver. To be sure, the Government disputes petitioner's commitment to public transportation by noting that petitioner could have taken public transportation by driving to Tarrytown and boarding a Conrail train.

However, this method of commuting would have required the use of petitioner's automobile and would have taken more time than driving wholly through New York State or commuting by bus and subway. In the circumstances, we find credible petitioner's assertion that he would have taken the bus and subway to work if he had not been required to carry his service revolver.

Despite our conclusion that petitioner would have utilized public transportation to commute to work but for the necessity of carrying his service revolver, we find that petitioner's additional commuting expenses were not directly connected with the pursuit of his employer's business, but were principally the result of his decision to reside in a comparatively remote suburb adjacent to New Jersey. Accordingly, petitioner is entitled to no deduction for his commuting expenses under section 162(a), I.R.C. 1954, since such expenses were not necessary for the conduct of his employer's business.

In order to qualify for a deduction of transportation expenses under the general provisions of Section 162(a), petitioner must demonstrate that such expenses were directly connected with the pursuit of his employer's business and were not commuting expenses incurred solely for personal reasons. See Commissioner v. Flowers, supra, 326 U.S. at 470, 472-474; Gilberg v. Commissioner, supra, 55 T.C. at 614; Bunevith v. Commissioner, 52 T.C. 837, 841 (1969), affd. 70-1 USTC par. 9414, 25 AFTR 2d 70-935 (1st Cir. 1970). cf. Carragan v. Commissioner, 197 F. 2d 246, 249 (2d Cir. 1952). Petitioner has not met this burden. It is true that Petitioner would have incurred no additional expenses but for his employer's requirement that he carry his service revolver while within the City of New York. However, this requirement presented difficulties for petitioner only because he had chosen to live near New Jersey so that the most direct routes to his place of employment, either by automobile or public transportation, re-

quired travel through that state. The New York City Police Department required only that petitioner be armed when inside the City. The petitioner's added costs in meeting this requirement were due to his choice of a personal residence in Suffern and New Jersey law which prevented him from carrying his revolver through that state. These costs were wholly unnecessary and inappropriate for the conduct of the New York Police Department's law enforcement duties within the City of New York. Accordingly, petitioner's added expenses in avoiding travel through New Jersey, as well as his basic commuting costs, are personal in nature, and no deduction for such expenses can be allowed. Section 262, I.R.C. 1954.

We have reached our decision in this case solely on the basis of the Government's argument that petitioner's commuting expenses were wholly personal in nature. We accordingly express no opinion as to whether an employee's additional commuting costs for

utilizing a more expensive mode of transportation than he would otherwise have used in order to carry job-required tools may be considered deductible in appropriate circumstances. See generally Rev. Rul. 75-380, supra, 1975-2 C.B. at 60.

We emphasize that we do not pass upon the application of the concept suggested in Fausner v. Commissioner, supra, 413 U.S. at 838 -- i.e., that an allocation of costs might be appropriate where additional expenses are incurred for transporting job-required tools and material to and from work. That concept is inapplicable here because petitioner has failed to satisfy the threshold condition that any deductible expenses must be incurred in pursuit of business and not as the result of personal requirements. This threshold condition was plainly indicated in Commissioner v. Flowers, supra, 326 U.S. at 473:

> The added costs in issue, moreover, were as unnecessary and inappropriate to the development of the railroad's business as were his personal and living costs in Jackson. They were incurred solely as the result of

> the taxpayer's desire to maintain a home in Jackson while working in Mobile* * *. It simply asked him to be at his principal post in Mobile as business demanded* * *.

Similarly here, the City of New York did not require petitioner to travel from Suffern to his post of duty and to have his service revolver with him at all times in New York. It did not require him to carry that revolver through New Jersey. It was petitioner's personal choice to reside in a place where the most convenient route to his post of duty was through New Jersey. This case is quite unlike those cases where a taxpayer is required to incur additional expenses for transporting job-related tools to work regardless of where he lives. The possible allowance of deduction of the extra cost of such transportation is not a matter that is in issue or decided herein.

Due to the Government's concession of another issue,

Decision will be entered under Rule 155.

Reviewed by the Court.

SCOTT, J., concurring: I agree with the majority that petitioner is not entitled to any deduction for travel between his home and place of employment since it was for personal reasons that he chose his place of residence. However, I do not agree with any implication that might be present in the majority opinion that under certain circumstances petitioner would be entitled to a deduction because of the requirement that he have his service revolver with him at all times when he was in New York City.

Accepting the fact as found by the majority that because of New Jersey law petitioner could not carry his pistol through that state,[1] I do not consider that this

[1] Although I am willing to accept the conclusion of the trial judge even in a fully stipulated case such as this, I have great difficulty in understanding why petitioner was prohibited by New Jersey law from carrying a revolver through New Jersey. The parties stipulated that "New Jersey permits officers employed by governmental agencies outside the State of New Jersey to carry weapons in New Jersey only while engaged in official duties and upon prior notification

to local police authorities" and "generally, New Jersey authorities issue gun permits only to those individuals with job requirements necessitating that they be armed in that state or to individuals who can establish other urgent need. Applications for gun permits are evaluated on their own merits." This stipulation is obviously the stipulation of a legal conclusion. The parties did not stipulate whether in fact petitioner had applied for a permit and whether the state authorities had denied the application.

Sec. 2A: 151-43 of the New Jersey Statutes Annotated as applicable to the year here involved contains numerous exceptions to the prohibition against the possession and carrying of a pistol without a permit. The section of this statute to which the parties obviously had reference in their stipulation is subsection(s) which provides:

case falls within the "tool" reference made in Fausner v. Commissioner, 413 U.S. 838 (1973). The Fausner case (at 839) states, insofar as here pertinent, as follows:

> As the Court of Appeals indicated, Congress has determined that all taxpayers shall bear the expense of commuting to and from work without receiving a deduction for that expense. We cannot read Section 262 of the Internal Revenue Code as excluding such expense from "personal" expenses because by happenstance the taxpayer must carry incidentals of his occupation with him. Additional expenses may at times be incurred for transporting job-required tools and material to and from work. Then an allocation of costs between "personal" and "business" expenses may be feasible. But no such allocation can be made here. [Fn. ref. omitted.]

In my view the reference to "additional expenses" being incurred for transporting "job-required tools and material"

Footnote 1--continued

Law enforcement officers employed by governmental agencies outside of the State of New Jersey who are engaged in their official duties provided that they have first notified the chief law enforcement officer of the municipality or the county prosecutor of the county in which they are engaged or the superintendent.

However, subsection (d) of this same statute provides an exception to the prohibition against carrying weapons without a permit as follows:

The regularly employed members, including detectives, of the police department of any county or municipality or of any State, interstate, municipal or county park police force or of any county boulevard police force at all times, while within the State of New Jersey * * *.

I would conclude from this statute, and have found nothing in the New Jersey law to persuade me to the contrary, that without any necessity of obtaining a permit from New Jersey a regularly employed police officer of New York City, such as petitioner, would be exempt from the prohibition against carrying a pistol within the State of New Jersey.

in the Fausner case was to the cost of transporting the tools where an additional cost such as excess baggage or trailer rental was incurred. It does not relate to requiring a determination of the mode

of transportation a taxpayer contends he may have used but rather to the mode of transportation that he actually did use..

FAY, J., dissenting: I respectfully dissent from the majority's conclusion that petitioner's expenses were "wholly personal." I agree with Judge Sterrett that contained within petitioner's expenses of travelling to and from work is a portion in excess of what petitioner would have otherwise necessarily incurred in commuting, and that excess is directly related to a requirement imposed by petitioner's employer.[1] See Fausner v. Commissioner, 413 U.S. 838, 839 (1973).

The majority opinion expressly declines to "pass upon the applicability of the concept suggested in Fausner***." Majority supra at 11. In my view, the Fausner question should have been addressed fully, and, furthermore, should have been resolved in petitioner's favor.[2] We have never, before today, ended our inquiry in this type of case with the conclusion that a taxpayer requirement-based excess travel costs. See, for example, the analysis in Hitt v. Commissioner, 55 T.C. 628 (1971)

and in Gilberg v. Commissioner, 55 T.C. 611 (1971).

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1 I base my dissent upon the facts as found by the majority including their finding that petitioner could not have obtained a permit to carry a gun through New Jersey.

2 In fact, the parties briefed this case almost exclusively on the Fausner issue.

It is obvious to me that petitioner incurred excess travel costs and that the excess was caused by his employer's requirement. True, the amount of that excess will be a function of petitioner's choice of residence, but that is always the case when such excess travel costs present themselves. For example, if a construction worker living 30 miles from his jobsite were required to tow a trailer of tools, would not his excess be less if he moved 20 miles closer to his jobsite, or completely eliminated if he moved into a house adjacent to the jobsite? The majority opinion, supra at 12, seeks to distinguish the long

line of "tool" cases as applying only to "additional expenses for transporting job-related tools to work regardless of where [the taxpayer] lives." However, as my example above illustrates, the "additional expense" could be eliminated or greatly reduced in almost every "tool" case. Thus, I remain unpersuaded that this case is different.[3] Petitioner's "additional expenses," those over and above his reasonable commuting expenses, were caused by his employer's requirement that petitioner have his gun with him when he entered New York City[4]. Where he lived does not alter that requirement; it merely affects the amount of the excess which could range from zero, see Coker v.

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[3] I am also unconvinced by Judge Scott's concurrence. In this case it is not the mode of travel but rather the route of travel which is mandated by the employer's requirement. If a true excess cost exists, it is irrelevant whether that excess exists due to mandated routes of travel or mandated means of travel. However, I do not necessarily agree with Judge Sterrett that we look to the taxpayer's "preferred means of transportation in order to calculate any excess.

Commissioner, 487 F.2d 593(2d Cir. 1973), cert. denied 414 U.S. 1130 (1974), on up.

I express no opinion as to the amount of petitioner's deductible travelling expenses. Although I would certainly reach the issue were I writing for the majority, I see no reason to enter into a laborious analysis of calculating

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4 In my view, petitioner's excess travel costs were caused by his employer's requirement even though the New Jersey law also affected petitioner's route of travel. If it were not for the employer's requirement, the New Jersey law on carrying guns would be irrelevant to petitioner.

Consider the case of a construction worker who must travel one of two equal distance roads to his jobsite. He chooses Road 1 because using Road 2 would necessitate paying $1/day toll charge. Suppose my worker's employer imposes a requirement requiring that worker to carry his tools to and from work, which, in turn, necessitates that worker's towing a trailer to and from work. Pursuant to that requirement and state law prohibiting trailers on Road 1, petitioner must travel Road 2 and incur the $1/day toll charge. Would not that $1.00 be deductible? I conclude that it would. When a combination of an employer requirement and an outside force causes an employee to incur expenses greater than his ordinary, reasonable commuting expenses, the excess should be deductible by the employee if the outside force's applicability to the employee is caused by the employer's requirement.

footnote 4 continued

In fact, in almost every tool case it will be a combination of factors which lead to the employee's incurring additional expenses. For example, if an employer requires a worker to have tools at the jobsite but the employer provides no tool storage place, it is both the employer's requirement and the worker's desire to have his tools left unexposed to weather and thieves that make the worker transport his tools to and from the jobsite.

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the excess amount at this time. It is clear from the record that no matter what bases of comparison are used, such as driving through New York versus driving through New Jersey or using public transportation through New York versus driving through New Jersey, petitioner did incur additional costs.[5] Accordingly, I would hold that petitioner is entitled to some part of his claimed travel expenses deduction.

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[5] However, I note that respondent, on brief, argued that if we held petitioner incurred deductible travel expenses, the deductible amount should be limited to the difference in cost between taking public transportation through New Jersey and taking public transportation, as much as possible, through New York. See also Rev. Rul. 75-380, 1975-2 C.B. 59, at 60.

STERRETT, J., dissenting: I respectfully dissent from the ultimate conclusion reached by the majority.

In so doing I proceed from the same basic premise as did the majority: namely, "a taxpayer's cost of commuting between his residence and his place of employment is a nondeductible personal expense." While the Supreme Court in Fausner v. Commissioner, 413 U.S. 838, 839 (1973), emphasized that hornbook rule of tax law, it added the following postscript:

> Additional expenses may at times be incurred for transporting job-required tools and material to and from work. Then an allocation of costs between "personal" and "business" expenses may be feasible. But no such allocation can be made here.

The facts in the instant case are a perfect illustration of when such an allocation can, and should, be made.

The circumstances are ideal because a revolver is to a policeman what a hammer is to a carpenter. A carpenter is required by his employer to bring his toolbox to work at his own expense. A policeman is

required by the New York City Police Department to have his revolver on his person at all times while in the City. In each case the requirement is imposed by the employer as a condition of employment. There is no personal element to the requirement; it is purely job-related.

Once the business necessity of an employee taking something with him to work is established, then any "additional expense" (over his preferred means of transportation) incurred solely by reason of that necessity should, under the Supreme Court's holding in Fausner, be deductible.

It is, of course, the taxpayer's burden to show the increment in the cost of commuting to work attributable to the job-related requirement. The precise nature of the added expenditure is of no moment as long as the expenditure can be characterized as "ordinary and necessary." Thus, it matters not whether the incremental cost is attributable to buying a trailer for the car to carry the tools or is attributable to taking a different route to work because

of circumstances beyond the taxpayer's control. Here, the taxpayer was prevented from taking the most direct and least expensive means of commuting to work by reason of New Jersey law.[1] I can envision a similar circumstance where a truck, carrying inflammable material, is limited by state law to the use of certain specific roads, thereby incurring additional expense. I would hold, therefore, that the petitioner incurred additional expense

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[1] We assume that the taxpayer could not get a permit to carry his revolver while in New Jersey.

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in getting to work due to a condition of his employment rather than his choice of where to live.

No doubt the question of determining the exact amount of the incremental job-related cost could be troublesome in many cases. See Coker v. Commissioner, 487 F.2d 593 (2d Cir. 1973). Here that presents no problem since the majority has found as a fact "that petitioner would have commuted to work by using the bus and subway but

for the necessity of carrying his service revolver." It appears that in this case the cost of using the bus and subway to and from work would have approximated $3.20 per day. I would allow petitioner to deduct any expense in excess of that amount incurred in commuting to work. Section 162, I.R.C. 1954.

WILES and WILBUR, JJ., agree with this dissenting opinion.

The Internal Revenue Service has reconsidered Rev. Rul. 56-25, 1956-1 C.B. 152, and Rev. Rul. 63-100, 1963-1 C.B. 34, in view of the decision by the Supreme Court of the United States in Fausner v. Commissioner, 413 U.S. 838 (1973), 1974-2 C.B. 42, affirming per curiam the decision of the Court of Appeals for the Fifth Circuit, 472 F. 2d 561 (1973), which in turn affirmed per curiam the decision of the United States Tax Court, 30 CCH Tax Ct. Mem. 1187 (1971).

Rev Rul. 56-25 holds that expenses incurred by an employee in using his automobile for commuting between his place of abode and his principal or regular place of work represents nondeductible commuting expenses within the scope of section 262 of the Internal Revenue Code of 1954, notwithstanding the fact that the automobile is also used to transport tools used by the employee in his work. In so holding, Rev. Rul. 56-25 states that the expenses incurred in going to and from work were not

increased by reason of the fact that the tools used by the employee in his work were also transported in the automobile.

Rev. Rul.56-25 was modified by Rev. Rul. 63-100 to remove the implication that such transportation expenses would not be deductible even if the employee would not have used his automobile on such trips "but for" the necessity of taking his tools with him. Rev. Rul. 63-100 holds that where it is necessary for a musician to use his automobile to transport his musical instruments between his residence and his place of work because they are too bulky to be carried otherwise, and he would not use his automobile on such trips "except for" that reason, the entire amount of his transportation expenses are deductible under Section 162 of the Code. The Revenue Ruling states that such expenses are deductible ordinary and necessary business expenses because they are occasioned primarily by the necessity for transporting bulky musical instruments, and that whether transportation

expenses are incurred primarily for business or personal reasons is a question of fact to be determined in each case.

In Fausner the taxpayer, an airline pilot, who regularly traveled by private automobile from home to his place of employment and back again, sought to deduct the entire cost of his commuting expenses under Section 162(a) of the Code on the theory that his automobile expenses were incurred to transport his flight bag and overnight bag and thus constitute ordinary and necessary business expenses. It was not disputed that the taxpayer would have commuted by private automobile regardless of whether he had to transport his two bags. The Supreme Court of the United States, referring to Section 262, held that the taxpayer was not entitled to any deduction with respect to the cost of transporting his flight and overnight bags in his automobile while commuting to and from his work. In addition the Court, citing Rev. Rul. 63-100, stated that additional expenses may at times be incurred for transporting job-required

tools and material to and from work and then an allocation of costs between "personal" and "business" expenses may be feasible.

In view of Fausner questions have arisen as to (1) whether the "primary purpose" or "but for" test of Rev. Rul. 63-100 is still valid, and (2) what is the amount of a taxpayer's deduction, if any, for transporting costs incurred in carrying job-required tools and material between the taxpayer's residence and place of work where the taxpayer (a) would have used the same mode of commuting irrespective of carrying such implements or (b) would not have used the same mode of commuting irrespective of commuting "but for" carrying such implements.

With respect to question (1), the Tax Court, the Fifth Circuit, and the Supreme Court in the Fausner case have all used an "additional expense" approach in determining whether the costs incurred by a taxpayer in transporting work implements to and from work are deductible. Thus, where

a taxpayer can prove that transportation costs were incurred in addition to the ordinary, nondeductible commuting expenses, and these additional costs are attributable solely to the necessity of transporting work implements to and from the work location, the taxpayer will be entitled to deduct such additional costs under Section 162 of the Code, regardless of whether the "primary purpose" or "but for" test set forth in Rev. Rul. 63-100 is satisfied.

In determining the deductibility of expenses in Rev. Rul. 63-100, and Rev. Rul. 56-25, as modified by Rev. Rul. 63-100, the sole focus is placed on the fact that the taxpayer would not have used the automobile for commuting purposes "but for" the need to take the tools. Those Revenue Rulings do not focus on whether the taxpayer incurred additional expenses for tool-carrying. The "additional expense" approach to deductibility of tool-carrying expenses referred to by the Supreme Court in Fausner focuses solely upon whether a taxpayer incurs expenses for

transporting job-required tools and material to and from work in addition to the non-deductible personal expense of commuting to and from such work.

Under the Supreme Court's "additional expenses" approach in Fausner, even though a taxpayer satisfies the "but for" test in Rev. Rul 63-100, the taxpayer is still not entitled to a transportation expense deduction unless it can be established that additional expenses were incurred because of the necessity of transporting work implements to and from work and the amount of such additional expenses can be accurately determined. On the other hand, even though a taxpayer is unable to satisfy the "but for" test in Rev. Rul. 63-100, a transportation expense deduction may still be allowable if the taxpayer is able to establish that such accurately determinable additional expenses were incurred because of the necessity of transporting work implements to and from work. Accordingly, the "but for" test, set forth in Rev. Rul. 63-100,

is no longer valid.

With respect to question (2) regarding the amount of a taxpayer's deduction, the principles set forth above apply in that the deduction does not depend on determining whether the mode of transportation that the taxpayer used in carrying work implements to and from work was different than the mode of transporation the taxpayer would have used to commute without such implements, but is dependent on the taxpayer's establishing that the expense in transporting the work implements to and from work were incurred in addition to otherwise nondeductible personal commuting expenses.

The Court in Fausner states that allocation of costs between personal and business expenses may be feasible in an "additional expense" situation. Therefore, the "all-or-nothing" position regarding the amount of a taxpayer's deduction in Rev. Rul. 63-100 is not within the plain meaning of the term "allocation" used by the Court in Fausner. Absent a showing of additional expenses incurred for transporting

work implements to and from work, a taxpayer's carrying of such items will not alter the nondeductibility of transporting expenses to and from work.

Therefore, in situations where a taxpayer can establish that additional expenses were incurred for transporting work implements to and from work, a reasonalbe and feasible method of allocation within the scope of the Supreme Court's opinion in Fausner would be to allow an ordinary and necessary business expense deduction for only the portion of the cost of transporting the work implements by the mode of transporting used which is in excess of cost of commuting by the same mode of transportation without the work implements. The fact that a taxpayer might have or would have used a less expensive mode of transportation if it had not been necessary to carrying the work implements is immaterial.

The following example illustrates the "feasible" allocation approach. A taxpayer commuted to and from work by public transportation before the taxpayer had to carry

necessary work implements. It cost $2 per day to commute to and from work. When it became necessary to carry the implements to and from work, it cost $3 per day to drive a car and an additional $5 per day to rent a trailer in which the implements were carried. The allowable deduction would be the $5 per day additional expense that the taxpayer incurred in renting the trailer to carry the work implements.

Rev. Rul. 56-25 is superseded and Rev. Rul. 63-100 is revoked. Pursuant to the authority contained in Section 7805(b) of the Code, the conclusion of this Revenue Ruling will not be applied to taxpayers who qualified under Rev. Rul. 63-100 for the deduction of transportation expenses paid or incurred prior to January 1, 1976.

REVENUE RULING 63-100

Where it is necessary for a musician to use his automobile to transport his musical instruments between his residence and his place of work because they are too bulky to be carried otherwise, and he would not use his automobile on such trips except for that reason, his transportation expenses are deductible under Section 162 of the Internal Revenue Code of 1954.

Such transportation expenses are ordinary and necessary expenses paid or incurred in carrying on his trade or business because they are occasioned primarily by the necessity for transporting bulky musical instruments even if such expenses would otherwise be nondeductible commuting expenses.

Whether transportation expenses are incurred primarily for business or personal reasons is a question of fact to be determined in each case.

Revenue Ruling 56-25, C.B. 1956-1, 152, states that expenses incurred by an employee in using his automobile for commuting between

his place of abode and his principal or regular place of work represent nondeductible personal expenses notwithstanding the fact that the automobile is also used to transport tools used by the employee in his work. That ruling is hereby modified to remove the implication that such transportation expenses would not be deductible even if the employee would not have used his automobile on such trips but for the necessity of taking his tools with him.